

**MINISTRY OF JUSTICE**

**TEXT OF THE DRAFT**  
**Amendments of the Constitution of the Republic of Macedonia**

Skopje, June 2005

**TEXT OF THE DRAFT**  
**Amendment XX of the Constitution of the Republic of Macedonia**

This Amendment is an integral part of the Constitution of the Republic of Macedonia and shall enter into legal force the day it is enacted.

**Amendment XX**

1. A person indicted for a criminal act shall be considered innocent until his or her guilt is determined by a final court decision.
2. A person charged for a misdemeanor shall be considered innocent until his or her guilt is determined by a final court decision, respectively, according to the cases provided by law or a decision by a state administration body or other public body.
3. This Amendment shall replace paragraph 1 of Article 13 from the Constitution of the Republic of Macedonia.

## **ELABORATION**

### **OF THE TEXT OF THE DRAFT**

#### ***Amendment XX of the Constitution of the Republic of Macedonia***

The Constitution of the Republic of Macedonia is formulating the presumption of innocence in the following manner (Article 13, paragraph 1): “The person indicted for a punishable act shall be considered innocent until his/her guilt is determined by a final court decision”.

The above-mentioned constitutional provision on presumption of innocence in practice shall be considered as basis for a general solution, according to which a sanction for a punishable act can be pronounced in legal procedure, by the court. Having in mind that the Constitution declares unity of the court organization, it means that the basic courts, as courts with general jurisdiction decide for all punishable acts, while the appellate courts decide in the second instance. Outside this organization there are no separate courts or other bodies that would have authorization to pronounce sanctions for punishable acts.

The Macedonian system for punishable acts knows two categories: criminal offences and misdemeanors. The first are regulated with the Criminal Code, enacted in 1996, while the latter are regulated by the Law on Misdemeanors from 1997. In 1995 the Law on Courts was passed, that abolished the previous Misdemeanor Courts and introduced a unique court organization.

Before adopting this regulation the following bodies had jurisdiction for imposing sanctions for the category of minor criminal offences – misdemeanors: Misdemeanor Courts, as well as state administration bodies and public services which were authorized by law to impose such sanctions (Police, Customs Department, Foreign Currency Inspectorate, different Administrative Departments etc.). After the above mentioned law came into force, the application of the old laws regarding the jurisdiction of certain bodies of the state administration and public agencies for imposing misdemeanor sanctions continued for another several years. However, with a decision of the Constitutional Court of the Republic of Macedonia U br.313/95 dated 10.07.1996 the provision from the Law on Courts which made possible other bodies (Customs, Foreign Currency, Foreign Commercial and Tax) to decide on certain type of misdemeanors was set aside. According to the explanation of the Constitutional Court, having in mind that the Constitution does not distinguish the punishable acts according to the level of social danger and stipulates that the guilt for certain punishable act has to be determined by a court decision, according to the Constitution, only the courts can decide on all punishable acts.

This Constitutional concept that the state has the right to impose punishment has long-term consequences on the position and the authorizations not only of the state administration but also on other public agencies that have certain supervisory and similar authorizations, which reflected in a negative manner on the work of the courts, and on the functioning of the state administration and the public agencies. On one hand, the courts were suddenly overburdened with great number of misdemeanor cases, including the smallest ones, such as parking tickets, which was a reason for delay and inefficiency of case processing. On the other hand, the state administration and the public agencies, that these authorizations were taken away from, found themselves in the position of passive observers in areas in which they were supposed to act efficiently in solving the claims of the citizens and legal entities, protection of their rights etc.

Due to the enormous increase of the number of cases, the Basic Court are continually inefficient, and due to non-timely resolution of cases, in the majority of the misdemeanor cases the statute of limitations has expired, which questions the purposefulness of the procedure for them. The procedure for the misdemeanor cases is slow and complicated, and the administrative work in the courts is hard and costly.

Due to the above stated, with the proposed amendment XX a possibility is created for other competent bodies, respectively, state administration and public bodies determined by law to decide on misdemeanors, as punishable acts.

In this process there is an obligatory distinction between the different types of punishable acts, such as the criminal offences which only the courts should decide and misdemeanors, for which besides the courts, other bodies will have to decide as well, because the Constitution with the new use of the term “punishable acts” does not make a distinction between them.

With the new constitutional provision a constitutional basis will be created for adopting legal solutions by which certain bodies shall receive punishable authorizations as well.

**TEXT OF THE DRAFT**  
**Amendment XXI of the Constitution of the Republic of Macedonia**

This Amendment is an integral part of the Constitution of the Republic of Macedonia and shall enter into legal force the day it is enacted.

**Amendment XXI**

1. Shall propose two members of the State Judicial Council and two members of the Public Prosecutors Council.
2. This Amendment shall replace line 5 of Article 84 from the Constitution of the Republic of Macedonia.

**ELABORATION**  
**OF THE TEXT OF THE DRAFT**

***Amendment XXI of the Constitution of the Republic of Macedonia***

Amendment XXV, item 5 provides that two members of the State Judicial Council shall be nominated by the President of the Republic of Macedonia, out of which one shall be a member of the communities which are not the majority in the Republic of Macedonia. By this amendment, besides the terminological unification, with the change of the name of the current Republic Judicial Council into State Judicial Council, it was decided to implement also the Amendment VI from the Constitution of Macedonia in a manner that will take into consideration the equitable and just representation of the citizens, and therefore a member of the communities which are not majority in the Republic of Macedonia, nominated by the President of the Republic of Macedonia shall become a member of the State Judicial Council.

Amendment XXIX establishes a new body – Council of Public Prosecutors and regulates its composition. Here, just like with the State Judicial Council it is stipulated that two members of the Public Prosecutors Council will be nominated by the President of the Republic of Macedonia, out of which one is a member of the communities which are not the majority in the Republic of Macedonia. Also within the composition of this body the principle of equitable and just representation of the members of the communities which are not majority in the Republic of Macedonia is respected in reference to all public institutions on all levels.

Since, Amendment XXIX regulates the composition of the Council of Public Prosecutors, and respectively the bodies that elect or appoint members in this Council, among which is the President of the Republic of Macedonia, there emerged the need to change appropriately Article 84 of the Constitution of the Republic of Macedonia, which regulates the competence of the President of the Republic of Macedonia.

**TEXT OF THE DRAFT**  
**Amendment XXII of the Constitution of the Republic of Macedonia**

This Amendment is an integral part of the Constitution of the Republic of Macedonia and shall enter into legal force the day it is enacted.

**Amendment XXII**

1. Shall propose the State Public Prosecutor for the Republic of Macedonia
2. This Amendment shall replace line 12 of Article 91 from the Constitution of the Republic of Macedonia.

**TEXT OF T ELABORATION  
OF THE TEXT OF THE DRAFT**

***Amendment XXII of the Constitution of the Republic of Macedonia***

Amendment XXVII stipulates that the State Public Prosecutor of the Republic of Macedonia shall be appointed and discharged by the Assembly of the Republic of Macedonia, upon proposal from the Government of the Republic of Macedonia. Therefore, it is necessary to change Article 91 from the Constitution of the Republic of Macedonia. Precisely line 12 of this Article needs to be changed, so that the Government of the Republic of Macedonia shall propose only the State Public Prosecutor, and not all the Public Prosecutors, as it currently does.



**THE DRAFT**  
**Amendment XXIII of the Constitution of the Republic of Macedonia**

This Amendment is an integral part of the Constitution of the Republic of Macedonia and shall enter into legal force the day it is enacted.

**Amendment XXIII**

1. During the first selection for a judge in a basic court the judge shall be elected for the duration of five years. After the expiration of five years and fulfillment of the conditions determined with law, the judge can be elected without limitations of the mandate.
2. The judicial function of a judge shall be permanently terminated:
  - if he/she personally requests that;
  - if he/she permanently loses the capacity to perform judicial functions, which will be determined by the State Judicial Council;
  - if he/she fulfils the retirement conditions;
  - if after the expiration of the five year mandate he/she is not elected for judge again; and
  - If he/she is elected or appointed to a different public function, except when the judicial function is on hold under the conditions determined with law.
3. A judge shall be discharged:
  - if he/she is convicted of a criminal offence with an unconditional prison term of at least six months; and
  - Upon violation of the Constitution of the Republic of Macedonia and severe violation of the laws while performing the judicial function, which are determined by the State Judicial Council.
4. The procedure for discharge of a judge is regulated by law.
5. Item 1 of this Amendment shall replace paragraph 1 of Article 99 of the Constitution of the Republic of Macedonia, items 2 and 3 shall replace paragraph 3 of Article 99 of the Constitution of the Republic of Macedonia, and item 4 shall supplement Article 99 of the Constitution of the Republic of Macedonia.

## ELABORATION OF THE TEXT OF THE DRAFT

### *Amendment XXIII of the Constitution of the Republic of Macedonia*

1. In accordance with paragraph 1 of Article 99 from the Constitution of the Republic of Macedonia, a judge is elected without limitations of the mandate.

The unlimited mandate of the judicial function in practice revealed several weaknesses from the aspect of impossibility to filter the professional personnel, especially the newly- elected judges. This solution has its support and is not contrary to the international standards from the field of judiciary, for example Basic Principles for Independent Judiciary of the United Nations, Recommendation no. (94) 12 of the Ministerial Committee of the Council of Europe and the European Charter on the Status of Judges, which give a possibility for election of a judge for a determined period of time during the first election, a period which should be short and will have the function of a trial mandate before the election with unlimited mandate.

Therefore, the Amendment provides a possibility the first election for a judge to be with a limited duration of the mandate, as a type of trial mandate.

In this way, by the postponing the age limit for awarding a permanent mandate for performing the judicial function, it will be possible to elect judges that are mature, with rich life experience and wisdom, which presents a big part of the preconditions to become a good judge.

2. In the existing Constitutional provision there is a long list of grounds for discharge of a judges<sup>1</sup>: if he/she personally requires that; if he/she permanently loses the capability for performing the judicial function, which will be determined by the Republic Judicial Council; if he/she fulfils the conditions for age pension; if he/she is convicted for a criminal offence with unconditional prison term in the duration of at least six months; due to serious disciplinary violation, stipulated by law, which makes him/her unworthy of performing the judicial function, as determined by the Republic Judicial Council and due to unprofessional and dishonest performing of the judicial function that is determined by the Republic Judicial Council in a procedure determined by law.

Due to enhancement of the independence and the security of the judges it is necessary to determine closely the grounds for termination of the judicial function, which refer to serious disciplinary violation stipulated by law, which makes the judge unworthy to perform the judicial function and due to unprofessional and dishonest performing of the judicial function.

As can be seen, the Republic Judicial Council has broad jurisdiction in deciding the judges' responsibilities. For example, "serious disciplinary violation stipulated by law, which makes the judge unworthy to perform the judicial function" is not a precise ground for discharge

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<sup>1</sup> Comparative examples for grounds for discharging:

- retirement, resignation, prison term penalty for criminal offence, permanent incapability to perform the function which occurred more than one year ago (Bulgaria)
- at judges' request, prison term, permanent incapability to perform the function, if he/she becomes a citizen of another country (Croatia)
- if the judge violates the Constitution or seriously violates the law during the performance of the judicial function and when the judge commits a criminal offence with premeditation while performing his/her function (Slovenia) etc.

of judges and it is often used without additional explanations during the proposal of the discharge of the judges.

Therefore, we feel that lines 5 and 6 from paragraph 3 of Article 99 from the Constitution should be replaced, i.e. instead of them to add another ground for termination of the judicial function: “violation of the Constitution of the Republic of Macedonia and serious violation of the laws while performing the judicial function”.

Having in mind that the discharge presents termination of the function, as a type of punishment for a committed criminal act or violation of the Constitution, respectively the laws, this Amendment proposes division of the grounds for termination of the judicial function from the grounds for discharge of the judicial function. A similar solution is stipulated in the Constitution for the judges of the Constitutional Court of the Republic of Macedonia (Article 111) as well as in the international documents from the field of the judiciary, for example the European Charter for the Status of the Judges which stipulates termination of the judicial function in case of resignation, physical disability, reaching certain age limit, expiration of the mandate stipulated by law or by discharge.

Having in mind that in accordance with the international standards from the field of judiciary, the discharged judge should be given all the guarantees of due process (right of participation in the procedure based on adversary procedure, right to an appeal against the decision for discharge) it is necessary to create in the Constitution a basis for legal regulation of the procedure for termination of the judicial function due to discharge.

**TEXT OF THE DRAFT**  
**Amendment XXIV of the Constitution of the Republic of Macedonia**

This Amendment is an integral part of the Constitution of the Republic of Macedonia and shall enter into legal force the day it is enacted.

**Amendment XXIV**

1. A judge can not be criminally prosecuted, arrested, detained nor held responsible for civil or legal liability due to an opinion and decision during the adjudication process.
2. A judge can not be detained without approval of the State Judicial Council, except if the judge was caught performing a criminal act for which the prescribed penalty is a prison term of at least five years.
3. The State Judicial Council decides on the immunity of the judges by two thirds majority of votes of the total number of members of the State Judicial Council, in a procedure regulated by law.
4. Item 1 of this Amendment shall supplement paragraph 1 of Article 100 of the Constitution of the Republic of Macedonia, and items 2 and 3 shall replace paragraph 2 of Article 100 from the Constitution of the Republic of Macedonia.

## **ELABORATION OF THE TEXT OF THE DRAFT**

### ***Amendment XXIV of the Constitution of the Republic of Macedonia***

In accordance with Article 100 from the Constitution of the Republic of Macedonia, judges enjoy immunity. The Assembly decides on the immunity of the judges.

The precondition for an independent and autonomous judiciary is the creation of constitutional and legal solutions for appropriate guarantees for the bearers of the judicial function. The development and the interest of democracy and the building of a legal state whose basis is independent and autonomous judiciary, requires to design and implement all the elements that are important and the guarantee that the judicial function and their bearer shall be in the center of the attention during the establishment and advancement of the judicial branch in the state.

The guarantee for objective, independent and conscientious performing of the judicial function presents the immunity of this function to the influence of individuals or institutions. In the Constitution this is provided through the institution of immunity. So, in the current provision of Article 100 from the Constitution of the Republic of Macedonia it is stipulated that the judges enjoy immunity and that the Assembly decides on the immunity of the judges. From this formulation it is impossible to see the extent and the content of the immunity of the judges, and also this provision from the Constitution does not inform that this will be determined by law. On the other hand, Article 64 of the Constitution determines the content and extent of the immunity of the Members of Parliament. The immunity of the Members of Parliament is defined in the criminal – legal and criminal – process manner. The substantive – legal immunity of the Members of Parliament is defined as criminal non-liability for the expressed opinion or voting in the Assembly. The process-legal immunity of the MPs provides that the MP can not be detained without approval of the Assembly, except if the MP was caught while performing a criminal act for which the prescribed penalty is prison term of at least five years.

The content of the immunity of the judge is regulated by the Law on Courts, and the substantive- legal immunity of the judge is not limited only to criminal non-liability, but to other types of non-liability for a given opinion or decision. So, according to the law, the Republic of Macedonia shall be held responsible for the damage that the judge or a lay-judge will cause during the performing of his/her function, to the citizens or legal entities by illegal or incorrect work.

As for the process-legal immunity, the Law on Courts defines it in a manner according to which the judge can not be detained without approval of the Assembly of the Republic of Macedonia, except if he/she was caught while performing a criminal act for which the prescribed penalty is prison term of at least five years. In this manner the process-legal immunity of the judges is made equal in content with the one of the MPs.

On the other hand, Article 103 from the Constitution determines that the lay-judges can not be asked to bear responsibility for an opinion or decision during the adjudication process. Only the lay judges are covered with this constitutional provision, and not the judges. Namely, the Constitution is inconsistent with such a solution, since it does not regulate the content of the immunity of the judges to which it should refer primarily, since they are the basic bearers of the judicial function.

With the proposed amendment, the immunity of the judges in principle will be made equal with the immunity of the MPs with certain enlargements which emerge from the specific judicial function, and which refer to the civil- legal liability. A general principle is that the judge should be completely released from liability for damage compensation for the committed errors during the adjudication since they will be corrected in the appeal procedure, and the state will bear the responsibility.

**TEXT OF THE DRAFT**  
**Amendment XXV of the Constitution of the Republic of Macedonia**

This Amendment is an integral part of the Constitution of the Republic of Macedonia and shall enter into legal force the day it is enacted.

**Amendment XXV**

1. The State Judicial Council shall consist of fifteen members.
2. The members of the State Judicial Council ex officio shall be the President of the Supreme Court of the Republic of Macedonia and the Minister of Justice.
3. Eight members of the State Judicial Council shall be judges elected by direct elections with secret voting by all the judges in the Republic of Macedonia. Three out of the elected judges shall come from the communities which are not the majority in the Republic of Macedonia. The procedure for election of the judge members of the State Judicial Council shall be regulated by law.
4. Three members of the State Judicial Council shall be elected by the Assembly of the Republic of Macedonia, out of which one shall be a member of the communities which are not majority in the Republic of Macedonia.
5. Two members of the State Judicial Council shall be appointed by the President of the Republic of Macedonia, out of which one shall be a member of the of the communities which are not majority in the Republic of Macedonia.
6. The President of the State Judicial Council shall be the President of the Supreme Court of the Republic of Macedonia.
7. The members of the State Judicial Council elected by the Assembly of the Republic of Macedonia or respectively appointed by the President of the Republic of Macedonia shall be university law professors, private attorneys or other distinguished lawyers.
8. The term of the elected and appointed members of the State Judicial Council shall be six years.
9. The elected and appointed members of the State Judicial Council shall enjoy immunity. A member of the State Judicial Council can not be criminally prosecuted, arrested or detained, nor held liable for any expressed opinion or voting during the proceedings of the State Judicial Council.
10. A member of the State Judicial Council can not be detained without approval of the State Judicial Council, except if he or she was caught while performing a criminal act for which the prescribed penalty is prison term of at least five years.
11. The State Judicial Council shall decide on the immunity of the members of the State Judicial Council, with two-thirds majority of votes of the total number of members in a procedure regulated by law.

12. The function of a member of the State Judicial Council shall terminate:

- if he or she personally requests that; and
- if he or she permanently loses the capability for performing the function.

13. A member of the State Judicial Council shall be discharged

- if he or she is convicted of a criminal offence with an unconditional prison term of at least six months; and
- due to violation of the Constitution of the Republic of Macedonia and severe violation of the laws while performing the functions of offices determined by the State Judicial Council.

14. The office of member of the State Judicial Council can not be performed together with other public offices and professions and a member of the State Judicial Council can not be a member of any political party.

15. This Amendment shall replace Article 104 from the Constitution of the Republic of Macedonia



## **ELABORATION**

### **OF THE TEXT OF THE DRAFT**

#### ***Amendment XXV of the Constitution of the Republic of Macedonia***

According to Article 104 from the Constitution of the Republic of Macedonia, the Republic Judicial Council consists of seven members. The Assembly elects the members of the Council. Amendment XIV provides that three of the members are elected with majority votes from the total number of MPs, and at the same time, there has to be a majority of votes from the total number of MPs that belong to the communities which are not majority in the Republic of Macedonia. The members of the Council are elected from among distinguished lawyers for the period of six years, with a right of one reelection. The members of the Republic Judicial Council enjoy immunity. The Assembly decides on their immunity. The function member of the Republic Judicial Council can not be performed together with other public functions and professions and the member of the Republic Judicial Council can not be a member of political parties.

The basic aim of the establishment of the Republic Judicial Council, as a new institution in the justice system, was to connect the legislative branch with the judicial branch so that the political basis of the election of the judges is replaced with the professional basis, and in that way to contribute to higher level of independence of the judiciary. The basic idea was the quality assessment of the candidates for judges to be made by a professional body, instead of the Assembly committees, which as exclusively political bodies decide according to political assessment.

However, the concept of the Republic Judicial Council has certain shortcomings on constitutional, respectively normative level, which do not follow the direction of the above-mentioned idea and which primarily refer to the small number of employees and the manner of proposing and electing its members.

Namely, the composition of the Republic Judicial Council with seven members, although representative one, is not capable to provide the necessary scope in the representation of the lawyers profession, from where all the proposals for candidates for judges should emerge and which is most competent to assess the professional and moral qualities of its members. The bigger number of members, although by definition would render the decision making process longer and more complicated, in general would make possible for a bigger number of initiatives to come forth and to review the issues from several different aspects. This is especially important in the selection of the candidates for judges, for which, due to the work progress, it is necessary to have professional assessment from people that come from different environments.

According to the current solution, the manner of selection of the members of the Republic Judicial Council contains dangers from political influences. The fact that they are elected by the Assembly, which is positioned on political basis and functions as a political body, and the interests of the political forces that dominate in its composition always take part in the decision making process, means a possibility of huge political influence, not only over the composition of the Council, but also indirectly – through it, on the composition of the judges. In order to decrease the influence of the politics in the system for proposing candidates for judges and their discharge, it is necessary to decentralize the system for creation of the personnel composition of the Republic Judicial Council.

The main idea for depoliticizing of the manner of election of the judges would be established if during the creation of the composition of the Council it is enabled that the majority of the members are judges, and they should dominate the process of election of the new judges in relation to the members that come from the legislative and executive power.

When we look at the provisions that regulate the composition of the Republic Judicial Council we can see that they do not provide for obligatory participation of the judges as members

in this body. The only precondition that the law stipulates for election of a member of the Council is that the person should be elected from among the distinguished lawyers. It means that it is possible not even one member to come from the judges, but from some other structures, i.e. the structures of the legislative and executive power, and in this way, the body shall be completely influenced by them. Having in mind the above stated, the provisions that regulate the composition of the Council are not in accordance with the Recommendations of the Ministerial Committee of the Council of Europe R (94) 12 on the independence, efficiency and the role of the judges and with the European Charter on the Status of the Judges 98/23.

The key remark to the provisions of the Republic of Macedonia regarding the Republic Judicial Council is addressed to the regulation of its composition. Namely, there is a lack of provisions that would stipulate that certain number of the Council members must come from the judges, the fact that two Council members are proposed by the President of the Republic, and is not regulated who proposes the other members of this body, clearly points at the possibility to elect as members of the Council persons that are not judges, and which would become members of the Council due to political and other influences. If the Republic Judicial Council is established on these basis, and that is quite possible, based on the Constitution and the law, it is easy to imagine a condition where the work of the Council does not contribute to the strengthening of the independence and efficiency of the work of the judges, but contrary to this it serves as means with the help of which the executive and legislative branch can exercise their influence over the courts.

The composition of the State Judicial Council proposed in the Amendment is in compliance with the above-mentioned European standards, taking into consideration the application of the provision on equitable and just representation of the members of the communities which are not the majority in the Republic of Macedonia.

In order to avoid the shortcomings that could be generated by exclusively judicial composition of the Council (corruption, nepotism, elitism) as a type of balance of the forces it is planned that the legislative and executive power (President of the Republic of Macedonia) should also propose members in the Council.

The professionalism of the composition of the State Judicial Council will be strengthened also with the foreseen possibility, besides the judges also to have members from the filed of other legal professions (university law professors, private attorneys and other distinguished lawyers).

Also the immunity of the members of the State Judicial Council is regulated with Amendment, regarding the extent and content of the immunity and it differs from the immunity of the judges in the civil – legal liability, which comes forth from the specific function of a member of the State Judicial Council. On the removal of the immunity decides the Council itself with two-thirds majority from the members and in a procedure stipulated with law.

Guarantees are implemented with an amendment with which the members of the State Judicial Council are protected from early discharge due to political reasons. Namely, it is foreseen to have termination of the function member of the Council. With the constitutionally determined possibilities for termination of the function, respectively discharge on the grounds of the stated reasons a guarantee is provided for the duration of the mandate. Also a protection from the political influences and pressures presents the provision which regulates that the fulfillment of the condition for discharge due to violation of the Constitution of the Republic of Macedonia and serious violation of the laws while performing the function shall be determined by the State Judicial Council.

**TEXT OF THE DRAFT**  
**Amendment XXVI of the Constitution of the Republic of Macedonia**

This Amendment is an integral part of the Constitution of the Republic of Macedonia and shall enter into legal force the day it is enacted.

**Amendment XXVI**

1. The State Judicial Council shall:
  - elect and discharge judges and lay-judges
  - elect and discharge presidents of the courts
  - monitor and assess the work of the judges;
  - decide on the promotion of the judges;
  - decide on the disciplinary responsibility of the judges;
  - decide on the reassignment of the judges to a different court;
  - decide on the removal of the immunity of the judges;
  - propose two judges to the Constitutional Court of the Republic of Macedonia;
  - and
  - perform other activities as provided by law.
2. The State Judicial Council may establish permanent and temporary bodies for conducting the activities within its jurisdiction.
3. The State Judicial Council shall submit an annual report of its work to the Assembly of the Republic of Macedonia.
4. This Amendment shall replace Article 105 from the Constitution of the Republic of Macedonia and line 15 of paragraph 1, Article 68 from the Constitution of the Republic of Macedonia shall be deleted.

## **ELABORATION**

### **OF THE TEXT OF THE DRAFT**

#### ***Amendment XXVI of the Constitution of the Republic of Macedonia***

According to Article 105 of the Constitution of the Republic of Macedonia, the Republic Judicial Council proposes to the Assembly the judges for election and discharge and determines proposals for discharge of the judicial function in the cases determined with the Constitution; decides on the disciplinary responsibility of the judges; assesses the professionalism and conscientiousness of the judges while performing the judicial function; and proposes two judges to the Constitutional Court of the Republic of Macedonia.

The Republic Judicial Council is responsible for four groups of questions:

1. Proposes to the Assembly judges for election and discharge and determines a proposal for discharge of the judicial function; 2. Decides on the disciplinary responsibility of the judges; 3. Assesses the professionalism and conscientiousness of judges while performing the judicial function; 4. Proposes two judges to the Constitutional Court of the Republic of Macedonia.

Among the competences of the Republic Judicial Council are the authorizations related to the assessment relevant for the election and discharge of the judges, as the most sensitive issue in the process of creation of the personnel composition of the courts and as an area which is traditionally closely monitored by the political interests.

The Law on the Republic Judicial Council contains more detailed provisions which regulate the competence of the Republic Judicial Council.

This Amendment defines more precisely the competences of the State Judicial Council. Having in mind the positioning of the State Judicial Council in the Amendment XXV and the need to change the current manner of election of judges in order to eliminate the political influences in this process, this Amendment introduces new competences for this body. Namely, the composition of the State Judicial Council and the manner of election of its members guarantees its independence from the executive and legislative power from one side, due to which all the issues related to the status of the judges (election, discharge, career promotion, disciplinary responsibility, immunity) are entrusted within the competencies of this body, and therefore it appears as supreme guarantee for the independence of the judiciary.

The Court Councils or bodies similar to them, which exist in majority of the European countries, have the same competence foreseen for the State Judicial Council.

At the same time, the European Charter on the Status of Judges stipulates that all the decisions that influence the election, recruiting, appointing, career promotion or the termination of the mandate of a judge are passed by a body that is independent from the executive and legislative branch where at least half of the members are judges, elected by their colleagues in a manner that guarantees their broadest representation.

Having in mind the increased competence of the State Judicial Council, and at the same time the increased number of its members, the amendment foresees establishment of permanent and temporary working bodies with which it will provide for more efficient working of this body.

## **TEXT OF THE DRAFT**

### **Amendment XXVII of the Constitution of the Republic of Macedonia**

This amendment is an integral part of the Constitution of the Republic of Macedonia and shall become legally effective on the day when it is proclaimed.

## **AMENDMENT XXVII**

1. The state prosecution shall be the only and independent state authority which shall uncover and prosecute perpetrators of crimes and other actions punishable by law and shall perform other tasks specified by law.
2. The state prosecution office shall perform its functions based on and within the framework of the Constitution and the laws and the international agreements ratified in accordance with the Constitution.
3. The function of the state prosecution office shall be performed by the Supreme State Prosecutor and the state prosecutors.
4. The types, responsibilities, establishment, abolishment, organization and functioning of the state prosecution office shall be regulated by law.
5. The Supreme state prosecutor of the Republic of Macedonia shall be appointed and dismissed by the Parliament of the Republic of Macedonia upon a proposal from the Government of the Republic of Macedonia for a term of six years without a right for reelection.
6. The state prosecutors in the Republic of Macedonia shall be appointed by the Council of the State Prosecution Office.
7. A State Prosecutor, when appointed for the first time to the position of a state prosecutor in the basic prosecution office, shall be appointed for a period of six years. After the

expiration of the six year period and fulfillment of the conditions stipulated by law, the state prosecutor may be appointed to the position without any limitation on the duration of the office.

8. The function of the Supreme Prosecutor of the Republic of Macedonia shall be terminated if he/she requests it, if he/she permanently loses the capability to perform his or her official functions, which shall be determined by the Parliament of the Republic of Macedonia, or if he/she fulfills the conditions for retirement.
9. The Supreme Prosecutor of the Republic of Macedonia shall be dismissed from office: if he/she has been convicted of a crime and sentenced to an unconditional imprisonment of at least six months or for violating the Constitution of the Republic of Macedonia or a more severe violation of the laws while performing his/her function, which shall be determined by the Parliament of the Republic of Macedonia.
10. The function of a State Prosecutor shall be terminated if he/she requests it, if he/she permanently loses the capability to perform his or her official function, which shall be determined by the Council of state prosecutors, or if he/she fulfills the conditions for retirement.
11. The State Prosecutor shall be dismissed from office: if he/she has been convicted of a crime and sentenced to an unconditional imprisonment of at least six months or violating the Constitution of the Republic of Macedonia or a more severe violation of the laws while performing his or her official function, which shall be determined by the Council of state prosecutors.
12. The procedure for dismissal from office shall be regulated by law.
13. This amendment shall replace article 106 of the Constitution of the Republic of Macedonia.

## **ELABORATION**

### **OF THE TEXT OF THE DRAFT**

#### **Amendment XXVII of the Constitution of the Republic of Macedonia**

According to the article 106 of the Constitution of the Republic of Macedonia, the *public* prosecution is the only and independent state authority which prosecutes perpetrators of criminal and other acts punishable by law. The Public Prosecution performs its functions on the basis on the Constitution and the law. The public prosecutor is appointed and dismissed by the Parliament for a period of six years.

In the Constitution of the Republic of Macedonia, the position of the public prosecution office in the legal system of the Republic of Macedonia and in the sphere of criminal justice, as a unique and independent state authority responsible for implementation of the constitutionally determined function of prosecution of perpetrators of punishable actions, is not fully regulated. Namely, even though the new Law on Public Prosecution (enacted 2004) has strengthened the position of the public prosecution office, in line with the international standards in the area of the implementation of the public prosecutorial function, the lack of a constitutional basis is an obstacle to complete effectuation of the Prosecutor's authority.

Therefore the constitutional amendments envisage several novelties which basically aim at the protection of the public prosecution office from influences of the legislative and the executive government, which in turn should facilitate this authority effectively to prosecute the holders of public functions for perpetrated crimes with elements of corruption, misuse of the official duty, violations of human rights and other acts specified in national and international legislation.

Having in mind that the public prosecution is a state authority which on behalf of the state and the general interest ensures the unique application of the law against perpetrators of crimes, it has been assessed that it would be more appropriate to rename this authority from public prosecution office to state prosecution office.

Furthermore, following the recent changes of the procedural laws as well as the new Law of Public Prosecution (enacted 2004) which has strengthened the role of the public prosecution

office in the pre-criminal procedure, the proposed amendment extends the constitutional jurisdiction of the public prosecution in the sphere of uncovering the perpetrators of crimes and other punishable actions, in order to provide for an efficient penal prosecution of the new criminal forms and the evermore present forms of organized crime. In that context, having in mind that, in the area of organized crime and corruption, on the international level there are numerous documents which the Republic of Macedonia has accepted and which are an integral part of the national legislation, it is necessary to extend the basis for performance of the prosecutorial function to include international agreements ratified in accordance with the Constitution.

The existing article 106 of the Constitution of the Republic of Macedonia defines only the position of the prosecution office as an authority, but not the holders of the prosecutorial function. Therefore, the amendment defines the holders of the function of the state prosecution office which are the Supreme State Prosecutor and the state prosecutors. In addition, the Constitution does not contain a constitutional basis for which issues related to the prosecution should be regulated by law, which type of provision exists in Article 98 paragraph 5 of the Constitution and refers to the Courts. Therefore, the proposed amendment stipulates that the types, responsibilities, establishment, abolishment, organization and functioning of the state prosecution office shall be regulated by law, which creates a constitutional basis for legislative regulation of this matter.

The amendment also envisages novelties with respect to the appointment and dismissal from office of the holders of the function of the state prosecution office. In order to provide a greater independence in the performance of their function with respect to the legislative and the executive branch, for the Supreme State Prosecutor the Constitution will incorporate a provision whereby the Parliament of the Republic of Macedonia shall appoint and dismiss from office the Supreme State Prosecutor of the Republic of Macedonia upon a proposal from the Council of the State Prosecution Office, a newly established independent constitutional authority. With respect to the other holders of the state prosecutorial function, this amendment stipulates that they shall be appointed and dismissed from office by the Council of the State Prosecution Office. In this way the Government of the Republic of Macedonia as a segment of the executive power is excluded as a possible creator of staffing decisions with respect to the prosecution office, which in turn guarantees to the prosecutors the independence necessary for efficient performance of the function.



With respect to the duration of the term of the prosecutors, the constitutional provision remains unchanged and it continues to be six years. The novelty is that this six year term is envisaged only for the first appointment in the lowest [rank] of the prosecution office and after the expiration of this term; similarly to the provision for judges, the constitution envisages a permanent term provided that the conditions stipulated by law have been fulfilled. This solution is in accordance with the Recommendation (2000)19 of the Council of Europe for the role of the public prosecution office, the reports of the GREKO group as well as the comparative legislation of the member states of the European Union. Namely, it has been assessed that this will primarily provide for professionalism and greater efficiency in the performance of the function and at the same time will ensure the independence of the prosecution office from the executive government.

Regarding the bases for termination of the function of state prosecutor and the bases for dismissal from office, the amendment incorporates solutions identical to those for the holders of judicial functions, with the provision that in the case of state prosecutors the violation of the Constitution and the laws is determined by the Council of State Prosecutors and in the case of the Supreme State Prosecutor this is done by the Parliament of the Republic of Macedonia.

Considering that prosecutors and judges, in the event of dismissal from office, need to be provided all of the guarantees of an impartial procedure, the Constitution should create a basis for the legislative procedure for the termination of the function state prosecutors because of dismissal of office.

## **TEXT OF THE DRAFT**

### **Of amendment XXVIII of the Constitution of the Republic of Macedonia**

This amendment is an integral part of the Constitution of the Republic of Macedonia and shall become legally effective on the day when it has been proclaimed.

## **AMENDMENT XXVIII**

1. The Supreme State Prosecutor of the Republic of Macedonia and the state prosecutors of the Republic of Macedonia shall enjoy immunity. A State Prosecutor may not be criminally prosecuted, arrested, detained, nor be held civilly and legally accountable for the opinions and decision made during the performance of his or her prosecutorial duties.
2. The Supreme State Prosecutor of the Republic of Macedonia may not be detained without the approval of the Parliament of the Republic of Macedonia, except if discovered during the performance of a crime for which the prescribed punishment is imprisonment of at least five years.
3. A State Prosecutor of the Republic of Macedonia may not be detained without the approval of the Council of State Prosecutors, except if discovered during the performance of a crime for which the prescribed punishment is imprisonment of at least five years.
4. The Parliament of the Republic of Macedonia shall decide about the immunity of the Supreme State Prosecutor.
5. The Council of State Prosecutors shall decide on the immunity of state prosecutors with a two third majority of the total number of members in the Council in a procedure regulated by law.
6. The function Supreme State Prosecutor and state prosecutor is incompatible with the performance of any other public office or membership in a political party.
7. Political organization and activities shall be prohibited within the state prosecution office.

8. This amendment shall replace article 107 of the Constitution of the Republic of Macedonia.

**ELABORATION**

**OF THE TEXT OF THE DRAFT**

**Amendment XXVIII of the Constitution of the Republic of Macedonia**

According to article 107 of the Constitution of the Republic of Macedonia, the public prosecutor shall enjoy immunity. The immunity is decided by the Parliament. The function of public prosecutor is incompatible with the performance of any other public function, profession, or membership in a political party.

This amendment determines the content of the immunity of the state prosecutors, analogous to the immunity of the judges. The generally accepted principle is that the authority that appoints and dismisses the state prosecutor from office, should decide on the revocation of the immunity of the state prosecutor. In that sense, the amendment stipulates that the Parliament of the Republic of Macedonia shall decide about the immunity of the Supreme State Prosecutor and the Council of State Prosecutors shall decide on the immunity of state prosecutors with a two third majority of the total number of members in the Council in a procedure regulated by law.

Regarding the incompatibility of the prosecutorial function with other public functions and professions and membership in a political party as well as the ban of political organization and activities within the state prosecution office, the existing provision has been preserved with terminological modifications with respect to the name of the authority and the holders of this function.

## **TEXT OF THE DRAFT**

### **Amendment XXIX of the Constitution of the Republic of Macedonia**

This amendment is an integral part of the Constitution of the Republic of Macedonia and shall become legally effective on the day when it has been proclaimed.

#### **AMENDMENT XXIX**

1. The Council of state prosecutors consists of eleven members.
2. The Minister of Justice and the Supreme State Prosecutor shall be ex officio members of the Council of state prosecutors.
3. Five members of the Council of state prosecutors shall be elected from the pool of the state prosecutors on direct elections with covered voting by all state prosecutors in the Republic of Macedonia. Two of the elected members shall be members of the communities which are not majority in the Republic of Macedonia. The procedure for election of members of the Council of state prosecutors from the pool of the state prosecutors shall be arranged with a Law.
4. Two members of the Council of state prosecutors shall be elected by the Assembly of the Republic of Macedonia and one of them shall be member of the communities which are not majority in the Republic of Macedonia.
5. Two members of the Council of state prosecutors shall be appointed by the President of the Republic of Macedonia and one of them shall be member of the communities which are not majority in the Republic of Macedonia.
6. The Minister of justice shall preside at the Council of state prosecutors.
7. The members of the Council of state prosecutors elected by the Assembly of the Republic of Macedonia and appointed by the President of the Republic of Macedonia shall be from the pool of the law professors on the university, the lawyers and other prominent jurists.

8. The mandate of the elected and the appointed members of the Council of state prosecutors shall be five years,

9. The elected and the appointed members of the Council of state prosecutors shall have immunity. Member of the Council of state prosecutors cannot be criminally charged, arrested or put in custody, or charged for expressed opinion or voting on the session of the Council of state prosecutors.

10. Elected and appointed member of the Council of state prosecutors cannot be put in custody without approval given by the Council of state prosecutors, except if he/she was caught during performance of a crime, for which punishment with imprisonment of at least five years is provided.

11. The Council of state prosecutors shall decide on the immunity of the elected and appointed members of the Council of state prosecutors with two-thirds majority of the votes of the complete number of members in procedure prescribed by a Law.

12. The function of a member of the Council of state prosecutors shall cease in the following cases:

- if he/she requests that;
- if he/she permanently loses the capability for performing of the function member of the Council of state prosecutors

13. Member of the Council of state prosecutors shall be dismissed in the following cases:

- if he/she is convicted for a crime and punished with unconditional sentence of imprisonment in duration of at least six months; and

## **E LABORATION**

### **OF THE TEXT OF THE DRAFT**

#### ***Amendment XXIX of the Constitution of the Republic of Macedonia***

The subject of this amendment is the composition of the Council of state prosecutors, the mandate of its members, the immunity and termination, dismissal, and the ex officio members of this authority. It is an authority introduced in the Law on public prosecution office (enacted 2004). Taking into account its competencies, it was found that it is necessary to make it a constitutional category and to be called Council of State Prosecutors.

Regarding the composition of the Council of State Prosecutors it is provided to consist of 11 members. The Minister of Justice and the Supreme State Prosecutor are members ex officio, 5 members are elected from the pool of state prosecutors on direct elections with secret balloting by all state prosecutors in the country, two members are elected by the Assembly of the Republic of Macedonia and two members are appointed by the President of the Republic of Macedonia. The principle of fair and equitable representation of the members of the communities which are not majority in the Republic of Macedonia is applicable for the members who are elected or appointed. The mandate of the elected and appointed members of the Council of state prosecutors is five years.

In order to provide the expertise of the Council of state prosecutors and participation of the legal scholars, the amendment provides an opportunity for participation of other legal professions (law professors at universities, lawyers and other prominent jurists).

The amendment, also, regulates the immunity of the members of the Council of State Prosecutors which is equal to the immunity of the members of the State Judicial Council. At the same time, the Council decides on the revocation of the immunity of the elected and appointed members of the Council of State Prosecutors by two-third majority of the votes of all members in a procedure prescribed by Law.

Similar as in the case of the State Judicial Council, this amendment provides guarantees for protection of the members of the Council of State Prosecutors against premature dismissal due to political reasons. The termination of the function and the dismissal of the ex officio members of the Council are provided in the amendment. The constitutionally determined possibilities for termination of the function i.e. dismissal only due to the stipulated reasons, provides a guarantee

for the mandate. The provision which provides that the dismissal due to breach of the Constitution of the Republic of Macedonia and severe breach of the laws in the performance of the judicial function is decided by the State Judicial Council is also a protection mechanism against political influences and pressures. Regarding the termination of the function member of the Council of the Minister of Justice and the Supreme State Prosecutor, taking into account their ex officio membership, the termination of these functions means termination of their membership in the Council.

In order to provide professionalism of the Council of State Prosecutors, the amendment provides that the elected or appointed members of the Council of State Prosecutors cannot perform other public functions and professions. In order to provide de-politicization, the amendment provides prohibition of membership in any political party.



## **TEXT OF THE DRAFT**

### **Amendment XXX of the Constitution of the Republic of Macedonia**

This amendment is an integral part of the Constitution of the Republic of Macedonia and shall become legally effective on the day when it has been proclaimed.

## **AMENDMENT XXX**

1. The Council of state prosecutors shall:

- appoint and dismiss the state prosecutors;
- decide on promotion of the state prosecutors;
- decide on the disciplinary responsibility of the state prosecutors;
- decide on the revocation of the immunity of the state prosecutors; and
- perform other activities prescribed in a Law.

2. The Council of state prosecutors shall establish permanent and temporary working bodies for the performance of its activity.

3. This amendment shall amend the item 5. Public prosecution office in the Chapter III. Organization of the state authority in the Constitution of the Republic of Macedonia.

**ELABORATION**

**OF THE TEXT OF THE DRAFT**

*Amendment XXX of the Constitution of the Republic of Macedonia*

This amendment more precisely defines the competences of the Council of State Prosecutors. It is provided that the Council will appoint and dismiss the state prosecutors, will decide on the promotion of the state prosecutors and their disciplinary responsibility, for revocation of the immunity of the state prosecutors and to perform other activities prescribed by Law.

Some of the competences of the Council of state prosecutors are already arranged in the Law on public prosecution office, but because of the strengthening of the status of the state prosecution office as well as those carrying out the state prosecutors function, and as a result of that, strengthening of the status of the Council of state prosecutors and raising it to the rank of constitutional category, the need for widening its competence is evident.

Taking into account the international documents which, in order to provide successful and efficient performance of the prosecutor's function, demand that national legislation redefine the role of the holders of this function, it was necessary to establish an authority with these competences which will provide, based on objective criteria and the principles of expertise and competence, conditions for professional recruiting of the state prosecutors, advancing in their career, deciding on disciplinary responsibility and revocation of their immunity.

Taking into account the increased competence of the Council of State Prosecutors and, at the same time, the increased number of its members, regarding the Law on public prosecution office, the amendment provides establishment of permanent and temporary working bodies which will provide more efficient activity of this authority.

## **TEXT OF THE DRAFT**

### **Amendment XXXI of the Constitution of the Republic of Macedonia**

This amendment is an integral part of the Constitution of the Republic of Macedonia and shall become legally effective on the day when it has been proclaimed.

## **AMENDMENT XXXI**

1. The manner of exercising of the competence, the types, legal acting and the execution of the decisions of the Constitutional Court shall be prescribed by Law.
2. The internal organization and the manner of work of the Constitutional Court shall be prescribed by its rules and acts.
3. This amendment shall replace the a
4. Article 113 of the Constitution of the Republic of Macedonia.

## **ELABORATION**

### **OF THE TEXT OF THE DRAFT**

#### ***Amendment XXXI of the Constitution of the Republic of Macedonia***

According to Article 50, paragraph 1 of the Constitution, every citizen can call on protection of the freedoms and rights determined in the Constitution, before the courts and the Constitutional Court of the Republic of Macedonia in a procedure based on the principles of priority and urgency.

According to Article 110, line 3 of the Constitution, the Constitutional Court of the Republic of Macedonia protects the freedoms and rights of the person and citizen regarding freedom of belief, conscience, thought and public expression, political organization and action, and the ban of discrimination against citizens based on gender, race, religion, and nation, social and political membership.

The competence of the Constitutional Court of the Republic of Macedonia for direct protection of the basic human and civil rights was intended as one of the pillars of the democratic transformation of the society and the fulfillment of the principle of rule of law.

Except for the right of citizens to call upon their freedom and rights in front of the courts and the Constitutional Court of the Republic of Macedonia, and in regards to it, the competence of the Constitutional Court to protect certain number of freedoms and rights, the Constitution does not determine any closer conditions and manner of realization of this competence; neither does it provide enactment of a law which would regulate these issues. As in the case of the other issues necessary for realization of the constitutional court function, their arrangement is tacitly approved by the Constitution for the Constitutional Court in the framework of the arrangement of the procedure and the manner of its work. Because this authorization is only for the internal issues of the organization of the Constitutional Court, the Constitution does not provide any grounds for concretizing this competence with respect to the determination of the types and the character of the individual acts against which protection can be demanded, the conditions which should be fulfilled to demand this protection, or the legal actions of the decisions of the Constitutional Court rendered during the performance of this competence.

This situation shows a large deviation from the minimum standard elements of the constitutional regulation of this field which is usual for the other European countries which have constitutional judiciary with similar competence.

Furthermore, the failure of the Constitution to determine all the elements which comprise the essence of this protection, parallel to the disapproval to make it with a law, enables creation of its final form to be a subject of regulation with a bylaw, regardless that it is an act of the Constitutional Court of the Republic of Macedonia. Thus, the quality of the regulation of this field, measured by the criteria regarding the legal force of general legal acts in the hierarchy of the legal order, is lowered by two levels compared to the standards of the European countries in which this competence of constitutional judiciary exists.

According to the Article 112 of the Constitution of the Republic of Macedonia, the Constitutional Court shall nullify or proclaim void a law if it determines that it is not in consistent with the Constitution. The Constitutional Court shall annul or proclaim void another regulation, or general act, collective agreement, statute or program of a political party or association if it determines that they are not in consistent with the Constitution or with a law. The decisions of the Constitutional Court are final and self-executing.

According to Article 113 of the Constitution, the manner of the work and the procedure in front of the Constitutional Court are determined by act of the court.

The Constitution of the Republic of Macedonia in Article 112 provides only two basic types of legal activity of the decisions of the Constitutional Court: annulling and proclaiming void laws which it has found that are not consistent with the Constitution, i.e. annulling and proclaiming void other regulations or general acts, collective agreements, statutes or programs of the political parties or associations for which it determined that they are not consistent with the Constitution or with a law. This constitutional provision also determines the basic legal properties of the decisions of the Constitutional Court: that they are final and self-executing. The Constitution does not determine the issue which subject in the legal system is obligated to enforce the decisions of the Constitutional Court, neither the issue which subjects are authorized to start a procedure in the Constitutional Court. Article 113 of the Constitution authorizes organizing the manner of work and the procedure of the Constitutional Court by act of the Constitutional Court.

European and world standards in the constitutional arrangement of the issues connected to the legal activity of the decisions of the Constitutional Court and to the manner of their enforcement is covered only by this segment which is the most general (for example to determine the types of the legal activity of the decisions and the general obligation of all subjects in the law, depending on their authority, to enforce the decisions) and all individual aspects of that legal activity and the manner of execution of the decisions of the Constitutional Court are left to be regulated by law.

The situation in the Republic of Macedonia in that regard is different from the above-mentioned standards. The occasion that the Constitutional Court by its act and the Assembly by a

law arranges the issues connected to the performance of the function of the Constitutional Court which are not stipulated in the Constitution is a kind of deformation of the constitutional position of the Constitutional Court. In its essence it (the function of the Constitutional Court) should be the passive role of protection of the unity of the legal system and not the role of active creation of a legal system by providing norms of certain relations, because this role does not belong to the Court, according to its basic function and does not have the necessary democratic legitimacy for that.

The types of decisions that can be rendered by the Constitutional Court, their general properties (including the obligation of the Government for their enforcement) and the basic elements of their legal activity should be provided by law.

These constitutional changes are ruled by already established standards in the countries which have much longer experience in the constitutional judiciary. That would not only solve the many practical problems which currently exist in that field in Macedonia, but a true measure would be found for the competences of the Constitutional Court rules to govern only issues of an internal character i.e., the ones regarding its internal organization and manner of work.